

REDACTED TRANSCRIPT

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

RICHARD P., by and for R.P.,
and DENISE L., by and for K.L.,
Plaintiffs

v. CIVIL ACTION NO. 03-390 ERIE

SCHOOL DISTRICT OF THE CITY OF
ERIE, PENNSYLVANIA, et al.,
Defendants

JURY TRIAL - DAY NO. 5

Proceedings held before the HONORABLE
SEAN J. McLAUGHLIN, U.S. District Judge,
in Judge's Chambers & Courtroom C,
U.S. Courthouse, Erie, Pennsylvania, on
Monday, January 30, 2006.

APPEARANCES:

EDWARD A. OLDS, Esquire, and CAROLYN
SPICER RUSS, Esquire, appearing on behalf of

JAMES T. MARNEN, Esquire, appearing on behalf of
the Defendants.

Ronald J. Bench, RMR - Official Court Reporter

2

1 PROCEEDINGS

2

3 (Whereupon, the proceedings began at 8:35 a.m., on
4 Monday, January 30, 2006, in Judge's Chambers.)

5

6 THE COURT: First of all, let me, before we start
7 with the proposed final instructions, talk and invite comment
8 on the proposed supplemental jury instructions, which I read.
9 And which I'm willing to be disabused of, but I think it's
10 precisely contrary to my previous rulings. I do not understand
11 those points.

12 MR. OLDS: I see it's different in the instruction.

13 It's like this, your Honor. The way I see it is the rape,

14 well, the two elements are have they suffered from severe or
15 pervasive harassment, and was the school district deliberately
16 indifferent. It's like apples and oranges. While you find and
17 I don't dispute the fact that the school district was not
18 deliberately indifferent so as to cause the rape, that would be
19 the oranges. That doesn't mean that the rape itself wasn't
20 severe and pervasive harassment. And so in this kind of case
21 you're going to always have sexual harassment occur before
22 knowledge. And the school district isn't liable until the
23 event of the knowledge comes about. But the harassment could
24 be severe and pervasive before the knowledge happens. If I
25 could, for instance, let me --

1 THE COURT: Let me read the pertinent part of your
2 requested charge which gave me pause. You're talking about
3 severe, pervasive and objectively offensive elements, and
4 request the following language appear in that section of the
5 charge. "For purposes of deciding this fact, you may consider
6 the rape of the plaintiffs which occurred at the laundromat
7 across the street from the school in December of 2001. As I

8 will discuss below, you may not consider that rape in

9 connection with awarding damages to the plaintiffs." Okay. So

10 you were going to make another point, I cut you off?

11 MR. OLDS: If you look at your jury instructions

12 here --

13 THE COURT: What page are you on?

14 MR. OLDS: Page three. You could incorporate my

15 point on evaluating whether the harassment was severe, I think

16 the standard is, or pervasive, you may consider the plaintiffs,

17 the rape of the plaintiffs which occurred across the street

18 from the school district on December 19, 2001. However --

19 THE COURT: Fundamentally, I disagree. You have to

20 convince me -- we'll kill two birds with one stone. On point

21 two you say you may award such damages for injuries sustained

22 by the plaintiffs if you find that the defendant was

23 deliberately indifferent to the December, 2001 rape.

24 MR. OLDS: That's wrong.

25 THE COURT: Of course it's wrong.

1 MR. OLDS: But, judge, the question of severe or

2 pervasive is really different -- that's a separate element.

3 THE COURT: But a necessary element to make out a
4 complete cause of action.

5 MR. OLDS: Now, there could be, in this case there
6 could be a period of harassment that goes on before the school
7 district has knowledge of the harassment. And what you're
8 saying is the jury can't consider any harassment in terms of
9 deciding whether we've proved the first element of the case,
10 severe or pervasive. You're saying that the jury can't
11 consider any of that conduct that occurred before knowledge.
12 But I agree with you that they're not liable until they have
13 knowledge. But the conduct that occurred before their
14 knowledge can become part of a pattern of severe or pervasive,
15 that's just for the purpose of establishing that first element.

16 THE COURT: What do you say about that?

17 MR. MARNEN: I agree with the court, that the ruling
18 is that it should not be considered, only the harassment that
19 occurred of which they're aware, that the school should be
20 considered in that regard.

21 MR. OLDS: We're talking about only the first
22 element.

23 THE COURT: My view of it is this. The first

24 element I charge on -- one is that they were subjected to
25 harassment because of the intentional conduct of others. The

5

1 second element -- severe, pervasive and objectively offensive.

2 Now, your point is the second element, the severity.

3 MR. OLDS: Excuse me, this would be the third

4 element, it would be deliberate indifference. So I'm saying

5 you then have, once the school district is, cannot be held

6 responsible for any harassment that occurred before actual

7 knowledge. However, conduct that occurred before actual

8 knowledge can suffice or satisfy the first two elements.

9 THE COURT: I disagree, that is fundamentally wrong.

10 MR. OLDS: Judge, if you will be patient with me.

11 In any case, to repeat, in this case, there's going to be

12 harassment -- there has to be harassment that occurs --

13 THE COURT: I think, just to take a hypothetical

14 case, if it is likely that at some point on the continuum of

15 "harassment", the quality of notice to the school district

16 becomes sufficient, so to make out a jury issue on deliberate

17 indifference. I agree with you on that.

18 MR. OLDS: To satisfy the first two elements with
19 the harassment was severe, I mean, the school district cannot
20 be deliberately indifferent until it knows that something has
21 happened. And what you're saying in these instructions is that
22 the jury can't consider what has happened in terms of
23 establishing the first two elements.

24 THE COURT: Let me ask you. If what happened on
25 December 19th is not relevant on the issue of damages, if what

6

1 happened on December 19th is not relevant on the issue of
2 liability, how can it possibly be relevant on that other prong?

3 MR. OLDS: Because -- well, because it happened.
4 Our argument is that Linda Cappabianca became aware of such
5 sexual activity the day after it happened.

6 THE COURT: I misspoke, it is potentially relevant
7 on the issue of damages under a psychological eggshell theory
8 that I previously talked about. But go ahead.

9 MR. OLDS: Our theory is that Linda Cappabianca was
10 deliberately indifferent to this instance of severe and
11 pervasive sexual harassment, the rape. She found out about it

12 the next day.

13 THE COURT: There is value to the clarity of legal
14 thinking. Because it tends to sharpen our discussion. You
15 just said your theory is that Linda Cappabianca was
16 deliberately indifferent to the December rape. That can't be
17 the theory because I took that theory out of the case.

18 MR. OLDS: Here's why it's true. Because when she
19 found out from K.L. and C.B. that the rape had occurred the
20 other day, her failure to take any certain action that day
21 could constitute deliberate indifference. In other words, she
22 said to K.L., you know that's what people do when they're in
23 love. She could have said to K.L., well, would you like to
24 talk to somebody, should I get C.B. out of school because he
25 raped you.

1 THE COURT: It was information in her knapsack
2 which, according to your theory, should have supplied an
3 additional credence to the complaints that allegedly came
4 later, to that extent I agree with that.

5 MR. OLDS: But if we could take it to the next step,

6 which is, well, what was she deliberately indifferent to. She
7 was deliberately indifferent to an instance of severe or sexual
8 harassment. Obviously, nothing could be more severe than rape.

9 THE COURT: I'm not giving the charge. Discussion
10 is over on the point. I will give you -- I'm going to give you
11 one more pass, but I want to talk about the charge more
12 generally. I'm going to turn the floor over to you -- but
13 before I do, I have a question. If I was inclined subject
14 to -- did you review Mr. Marnen's suggested verdict form?

15 MR. OLDS: Right. I thought they were too long.

16 THE COURT: What's wrong with that?

17 MR. OLDS: Because I don't think you need to go down
18 through each element of the case here. I think mine, which
19 says was there severe or did she suffer from severe, pervasive
20 harassment and was deliberately indifferent to that. Mr.
21 Marnen, like when you parse -- if you parse this so finely, I
22 think what you're really inviting is an inconsistent verdict.

23 THE COURT: Well, then parse it for me and tell me
24 its potential inconsistency. I'm not saying shorter may not be
25 better. I'm just saying accurate is always better than

1 inaccurate.

2 MR. OLDS: First of all, I think you can combine one
3 and two, I don't know you need to have both of those
4 questions -- I think, for instance, four and five, I'm not
5 certain where that more vulnerable to additional harassment
6 comes from. Is that part of the test.

7 THE COURT: Actually, I'm glad you raised that
8 because I have a question on that. And, Mr. Marnen, having
9 reviewed your suggested jury interrogatories, I was essentially
10 of the opinion or was of the opinion that they were accurate
11 and they logically laid out sequentially what the jury should
12 do. But I have a lingering question about this. Look at four
13 and five. Four's a deliberate indifference question. This is
14 right from my charge, also, essentially. "Do you find that the
15 Erie School District acted with deliberate indifference to the
16 known harassment of plaintiff R.P. by other students after the
17 December 19, 2001 rapes?" Clear enough, that is the required
18 requisite mens rea. But five. "Do you find that the
19 deliberate indifference of the defendant caused plaintiff R.P.
20 to undergo additional harassment or made her more vulnerable to

21 additional harassment?" For the life of me I'm not sure what

22 that means?

23 MR. MARNEN: It means to prove a Title IX peer

24 harassment case, you have to demonstrate that the harassers

25 were in a sense essentially enabled by the indifference to

9

1 causing them to harass the plaintiffs further. I got this

2 right out of Davis_v._Monroe_County.

3 THE COURT: I'm not questioning its pedigree. I'm

4 just anticipating a jury question on the point. Maybe Davis

5 meant to say and as a result of the deliberate indifference,

6 the harassment was sustained. In other words, a failure to

7 prevent that by -- the phrase additional, it's confusing to me,

8 notwithstanding the fact it comes from the case.

9 MR. MARNEN: The word additional is mine, I will

10 confess to that.

11 THE COURT: It is.

12 MR. MARNEN: But the concept I think is from Davis.

13 That if the district is indifferent to harassment, there is no

14 further harassment, there is no liability.

15 THE COURT: Take out the word additional, which is
16 your word --

17 MR. MARNEN: Okay. Caused plaintiff to undergo
18 harassment, or made her more vulnerable to additional
19 harassment. I don't have a problem with additional coming out.

20 THE COURT: Reads better to me, too.

21 MR. MARNEN: I would suggest, too, if you do use
22 this in number five, that after defendant, Erie School District
23 be inserted.

24 THE COURT: Also on number six the phrase additional
25 should come out?

10

1 MR. MARNEN: Yes. Then number 12 I would put Erie
2 School District in there, too. You have to take additional out
3 of some of the other ones. K.L. is a mere image of R.P.'s.

4 THE COURT: Wherever additional appears, it comes
5 out. You said the Erie School District should be added?

6 MR. MARNEN: Number 12 I would stick in Erie School
7 District after the word defendant, for the sake of clarity.

8 And number five and number 12, I would do that. They were
9 inadvertently left out when this was prepared.

10 THE COURT: What would it be?

11 MR. MARNEN: Do you find that the deliberate
12 indifference of defendant Erie School District caused plaintiff
13 R.P. to undergo harassment, made her more vulnerable to
14 harassment.

15 THE COURT: Do you agree with that, Mr. Olds?

16 MR. OLDS: Yes.

17 THE COURT: That having been said, getting back to
18 your point, aside from the fact you think they're longer than
19 they need to be, is there anything legally incorrect in the
20 structure of the proposed special verdict form as submitted by
21 the defendant?

22 MR. OLDS: Well, yeah, I think that the test is
23 severe or pervasive.

24 THE COURT: Which one --

25 MR. OLDS: For instance, number two. This is in our

2 THE COURT: Hang on a second, you don't have to
3 argue the point, I'm familiar with the case. But what
4 precisely is the language in two that you think is --

5 MR. OLDS: It should be severe or pervasive.

6 MR. MARNEN: That's right. I think if one event is
7 sufficiently severe, can be enough.

8 THE COURT: We'll look at the case, see what the
9 cases say on it.

10 MR. OLDS: In those two Supreme Court cases, Boca

11 Raton -- I forget the name of the other case, it was decided.

12 I think the Third Circuit has addressed the difference between,
13 this was in Andrews, they said regular and pervasive. And then

14 the Supreme Court said severe or pervasive, there's a
15 difference in the language. But the courts have said probably
16 the Supreme Court is right.

17 THE COURT: If it was severe or pervasive, that
18 would suggest mere severity alone and severity could be
19 sufficient.

20 MR. MARNEN: Your point's well-taken, judge. I

21 guess I'll withdraw my agreement.

22 THE COURT: My point is if it's severe or pervasive,
23 then severity alone could suffice to support a claim absent
24 severity, isn't that right?

25 MR. OLDS: Yes. The Supreme Court says that.

12

1 THE COURT: I disagree.

2 LAW CLERK: We took that out.

3 THE COURT: I will say this, Mr. Olds, this much I
4 do know. One instance that is sufficiently severe can
5 constitute actual harassment. But I'm aware of no case law
6 that says the pattern of non-severe conduct can do it. But
7 I'll look at it.

8 MR. OLDS: The Supreme Court has said severe or
9 pervasive.

10 THE COURT: We'll check the case law on that. What
11 else besides that from a substantive legal standpoint?

12 MR. OLDS: On page four you add to suffer additional
13 harassment -- you would take out that additional.

14 THE COURT: We're going to take out additional all

15 the way through.

16 MR. OLDS: I didn't have any other points. If I
17 could just address this, this is going back to this one point
18 again.

19 THE COURT: Sure.

20 MR. OLDS: Chronologically, there can be, in terms
21 of satisfying the first two elements --

22 THE COURT: The first one being if there is
23 intentional harassment, the second one being?

24 MR. OLDS: Was severe or pervasive. And that
25 conduct, even though the school district doesn't, may not be

13

1 aware of it, can suffice to satisfy the first two requirements.
2 The school district is not responsible for that conduct or any
3 conduct, however, until it has knowledge of the conduct. And
4 then that is why the jury has to find the first two, but then
5 in addition, the jury has to find the third, that the school
6 district became aware of that severe and pervasive harassment
7 and was deliberately indifferent to it. And so I think that
8 the rape happened, it could be considered as to satisfy the

9 first two, and it's only the school district's deliberate

10 indifference to that and what's happened afterwards, that could

11 give the school district liability.

12 THE COURT: Besides just saying I disagree with him,

13 why substantively do you think that's incorrect, Mr. Marnen?

14 MR. MARNEN: As to what he just said?

15 THE COURT: Yes.

16 MR. MARNEN: He's starting to convince me that he is

17 correct. He's right that to be indifferent to harassment, the

18 harassment either has to occur simultaneously with the

19 indifference or prior to it. The harassment also has to be

20 harassment of which the district has control, so they can do

21 something about it.

22 THE COURT: Right.

23 MR. MARNEN: In the case of the rape, one of the

24 assailants arguably was going home from school at the time it

25 happened. That's A.K., A.K., I'm sorry. The others, however,

1 I think it's not debatable, they were not going home, they were

2 just hanging around, as were the victims. They got out of

3 school at 3 o'clock in the afternoon.

4 MR. OLDS: Actually, C.B. testified he was in PASS.

5 A.F.'s letter says that C.B. and A.K. were in PASS. And so

6 there is evidence that indicates that.

7 MR. MARNEN: I guess there is. It is there, it's

8 not credible because it's contradicted by the records. It's

9 there. So I think he's right. That it is harassment that you

10 can be indifferent to under Title IX. If it causes harassment,

11 then there's liability.

12 THE COURT: Okay. Where is that in my charge?

13 MR. OLDS: Page three, it would take out --

14 THE COURT: "You may consider the rape of the

15 plaintiffs which occurred at the laundromat across the street."

16 MR. OLDS: However, the court has previously

17 determined that the school district could not have had actual

18 knowledge of the events leading up to the rape -- I think that

19 says it. You have found that. And then the last line should

20 be, you should only consider the school district's response to

21 information it had after the rape.

22 THE COURT: Where were you?

23 MR. OLDS: Next to last line. Therefore, in

24 determining whether the harassment was severe, pervasive --

25 actually, you're going back to severe and pervasive there. I

15

1 wonder if you could just take out --

2 THE COURT: Take the sentence out all together,

3 given what we've just said right above it.

4 MR. OLDS: I wonder if you could say you may

5 consider the rape and the harassment which occurred after --

6 THE COURT: I think it's redundant. We're going to

7 take it out.

8 MR. OLDS: But they may consider events that

9 happened after the rape as well.

10 THE COURT: That's a point well-taken, let me just

11 think about this for a second. How about this for the first

12 sentence. In evaluating whether the harassment was severe and

13 pervasive, you may consider the rape of the plaintiffs which

14 occurred across the street from the school on December 19,

15 2001. As well as the alleged subsequent -- as well as the

16 alleged subsequent harassment and/or assaults.

17 MR. OLDS: Okay.

18 THE COURT: Any objection to that, Mr. Marnen?

19 MR. MARNEN: No.

20 MR. OLDS: Then that third sentence will come out.

21 THE COURT: That kind of takes care, in essence,

22 your two supplemental points, doesn't it?

23 MR. OLDS: Yes. The first one was really the

24 important one that I was trying to make.

25 THE COURT: Anything else you want?

16

1 MR. OLDS: No.

2 THE COURT: That correction having been made, in

3 other words, with the functional incorporation of your

4 supplemental point, you have no objection to the charge?

5 MR. OLDS: Except I think it should be or, instead

6 of --

7 THE COURT: We're going to check that. What about

8 you, Mr. Marnen?

9 MR. MARNEN: Page 14. Right in the middle where it

10 says fifth, the first item -- you should take out additional,

11 that occurs twice in that last line. Page four, I misspoke,

12 third paragraph.

13 THE COURT: In other words, additional should come
14 out.

15 MR. MARNEN: I think you need to add on there, that
16 is for another element, that the harassment, what I call the
17 additional harassment, caused injury, that's another element.
18 That's in my proposed verdict slip. That's point number six in
19 my proposed verdict slip.

20 THE COURT: In other words, it is a completed cause
21 of action?

22 MR. MARNEN: Yes, sir.

23 THE COURT: Just as an aside, I can't imagine if
24 they were to find there had been that type of harassment, that
25 they not find that there had been some type of injury. I think

17

1 as a technical matter it would require some type of injury to
2 complete the statutory tort. Do you have any objection to
3 that, just adding and caused injury?

4 MR. OLDS: No objection to that.

5 THE COURT: We'll just include that as part of the
6 fifth element, and caused injury.

7 MR. MARNEN: That's fine. This is a really minor
8 point, T.N.'s name is misspelled in the second to last line on
9 the next page.

10 THE COURT: Okay.

11 MR. MARNEN: Pages 13 and 14 indicate that when
12 there's knowledge or reckless disregard of truth and/or
13 falsity, you may presume that she had her reputation injured,
14 that she suffered damages. I don't think that's the law.

15 THE COURT: Where is that?

16 MR. MARNEN: Pages 13 and 14, last paragraph on 13,
17 first on 14. I think they still have to prove damage, injury.

18 THE COURT: In other words, the mens rea of the
19 actor can't drive the damages?

20 MR. MARNEN: Right. It does drive punitive damages
21 but not compensatory. I have the case here.

22 THE COURT: We'll check it. Is that it?

23 MR. MARNEN: It doesn't address that specific topic,
24 it addresses the significance of slander per se. And indicates
25 that the only significance of slander per se, it relieves the

1 plaintiff of the burden of proving special damages. But the
2 plaintiff still has to prove impairment of reputation.

3 THE COURT: We'll take a look at it.

4 MR. OLDS: You might be able to take the whole
5 paragraph out, it starts on 13 and goes over to 14.

6 THE COURT: I think that's right. I don't think,
7 with all due respect to the Pennsylvania jury instructions, I
8 don't think that's an accurate statement of the law.

9 MR. MARNEN: I have no other observations.

10 (Discussion held off the record.)

11 THE COURT: Back on the record.

12 MR. OLDS: If you're changing the instructions, the
13 verdict slip should have after the December 19, 2001 rape taken
14 out in the first and second questions.

15 MR. MARNEN: You're right.

16 THE COURT: Hang on a second. I agree with that.

17 MR. MARNEN: That should be taken out of two, three,
18 four -- eight.

19 THE COURT: Did you say two?

20 MR. MARNEN: I did.

21 THE COURT: What did you say about three, I think

22 three should stay the way it is?

23 MR. OLDS: I think that it's really, you're

24 instructing them that they can't consider that rape as part of

25 the actual knowledge, that they can't consider that. But I

19

1 think -- I think that it's sufficient for you to ask them did

2 they have actual knowledge.

3 MR. MARNEN: I think that the actual knowledge of

4 the rape is enough to get this going. I think it does have to

5 come out.

6 THE COURT: All right. We'll just say actual

7 knowledge of harassment of the plaintiff by other students

8 period.

9 MR. OLDS: Same with four.

10 THE COURT: The same thing with K.L. on her

11 questions. I presume at this point you've rehearsed your

12 closings, how long do you figure yours is going to be?

13 MR. MARNEN: Mine will be not less than 20 and not

14 more than 30 minutes.

15 MR. OLDS: Mine probably will be 30 and maybe

16 slightly longer than that.

17 THE COURT: All right.

18 (Recessed at 9:11 a.m., and reconvened at 9:25 a.m.,

19 in Judge's Chambers.)

20 THE COURT: I want to make sure that we got this

21 right. Because notwithstanding concessions, there is still

22 such a thing as plain error at the circuit. I'm going back to

23 the harassment, the effect of the December 19th incident. Let

24 me ask you this, Mr. Olds. This is along the lines of the jury

25 being able to consider the December 19, 2001 rapes on the

20

1 question of whether or not the harassment was sufficiently

2 severe and pervasive to make out that prong of the test.

3 That's where we are. It struck me as I was reflecting on this,

4 that if that proposition is right, then theoretically you could

5 get a verdict in this case even if the conduct that occurred

6 after December 19th was de minimus, no not sufficiently severe

7 and pervasive to independently support -- let me finish my

8 point, please. To independently support a Title IX claim, but

9 you could then throw into the equation the December 19, 2001

10 rapes, for which the school district had no knowledge, to make

11 out that prong. And to me, at least facially, is that right,

12 could that conceivably be; do you understand my point?

13 MR. MARNEN: Don't you have to have indifference to

14 severe and pervasive harassment, that causes severe and

15 pervasive harassment, isn't that the answer?

16 THE COURT: Yes. But my point is -- I'm saying the

17 severe and pervasive -- arguably the one incident of rape on

18 December 19th might be the type of thing, in fact probably

19 would be the type of thing that is sufficiently severe in and

20 of itself. But my question is logically would it make sense,

21 if all the conduct for which they could arguably be liable was

22 de minimus and if that conduct independently wouldn't be

23 sufficiently severe to make out a whole cause of action, could

24 you then throw the rape into it on the question of severity,

25 notwithstanding the fact I've already removed it from the case

21

1 on the question of notice?

2 MR. OLDS: I'm not looking at your charge, I didn't

3 bring it in here. I think that the jury --

4 THE COURT: That's all right.

5 MR. OLDS: The verdict slip tracks this, answers
6 certain questions. They have to say was there, was she
7 subjected to harassment, was it severe and pervasive. Do you
8 find that the school district was actually aware of harassment.
9 Do you find that the defendant school district was deliberately
10 indifferent to known harassment. But the other students, maybe
11 you cure what you're saying after December 19, 2001. Maybe
12 that goes back into number four. And do you find that
13 deliberate indifference caused plaintiff to undergo harassment
14 or made her more vulnerable to harassment. I think the
15 questions, obviously, I have to prove each element, your
16 instructions say that.

17 THE COURT: Maybe the problem was mine. Let me ask
18 a very simple question, although, the verdict form is not
19 necessarily structured this way. If as a matter of law or fact
20 in this case the harassment post December 19th was not
21 sufficiently severe or pervasive in and of itself to
22 independently support that claim, could you still get a verdict
23 on the back of the December 19, 2001 rapes?

24 MR. OLDS: I don't think so. But then we wouldn't
25 be here. There is evidence that there was harassment

1 afterwards. We're not suggesting to the jury --

2 THE COURT: Excuse me, it strikes me, I just throw

3 this out for consideration, I want to get this right. I want

4 to try this case once, if we can. Then isn't my charge

5 inconsistent on this point. In other words, you can't get a

6 verdict absent evidence of post December 19th sufficient

7 severity, that is the way you've asked me to redo the charge.

8 The way the charge now reads, the jury could conclude, since

9 they may consider the December 19th assaults separately, but

10 only on the issue of severity, that they could find that was

11 severe but nothing else was and still bring in a verdict, isn't

12 that right -- think it through? I am capable of the next man

13 walking down the street from becoming hopelessly confused and I

14 might be on this point and making it more difficult than it is,

15 I have to tell you it strikes me as crystal clear that there's

16 an inconsistency here, maybe not?

17 MR. OLDS: I don't think that there is. The

18 elements, that's why I started off with this, I said the

19 elements are apples and oranges. The apples are what is severe

20 harassment. The oranges are the school district's indifference
21 to severe harassment. And did that deliberate indifference
22 cause some injury. The problem is they could be deliberately
23 indifferent to the rape itself.

24 THE COURT: After the fact?

25 MR. OLDS: After the fact. We're not talking about

23

1 like somebody calling a little girl a name. We're talking
2 about these girls were raped.

3 THE COURT: This isn't helpful to me. What really
4 is helpful to me, Mr. Marnen, I'm not saying you have to say
5 anything or not --

6 MR. MARNEN: I was waiting. Doesn't harassment to
7 which you were indifferent have to be severe, pervasive and
8 offensive. The problem is solved by modifying number five in
9 the verdict slip. Do you find that the indifference of
10 defendant Erie School District caused plaintiff R.P. to undergo
11 harassment or made her more vulnerable to harassment. That was
12 severe and persuasive and offensive to a reasonable person of
13 R.P.'s sex.

14 THE COURT: Didn't we take out more vulnerable?

15 MR. MARNEN: It's there. Does that solve the
16 problem?

17 THE COURT: Say that again, maybe it does.

18 MR. MARNEN: Do you find that the deliberate
19 indifference of defendant Erie School District caused plaintiff
20 R.P. to undergo harassment or made her more vulnerable to
21 harassment, which was severe and pervasive and offensive to a
22 reasonable person of R.P.'s sex?

23 THE COURT: Perhaps that does. All right.

24 MR. OLDS: I think that they have to be able to
25 consider the rape on the question of the first two elements.

24

1 But you're instructing -- when you go on to deliberate
2 indifference on the next page.

3 MR. MARNEN: Number four would change it.

4 THE COURT: The fifth element on the charge?

5 MR. MARNEN: Yes.

6 THE COURT: Consistent with what was just read on
7 the verdict slip.

8 MR. MARNEN: Plaintiffs must prove by a
9 preponderance of the evidence that the alleged deliberate
10 indifference of the defendant Erie School District caused
11 plaintiff to suffer harassment or made them more vulnerable to
12 the harassment which was severe and pervasive and offensive to
13 a reasonable person of R.P.'s sex.

14 MR. OLDS: So what you're saying is we can't just
15 stop with the rape, we have to prove that something else had
16 happened and it was of a severe and pervasive nature.

17 THE COURT: All right. You can tinker with this
18 while they're doing their closings.

19 (Proceedings recessed at 9:35 a.m., in Judge's
20 Chambers.)

21 - - -

22 (Whereupon, Counsel gave their closing arguments to
23 the Jury.)

24 - - -

25 (Proceedings recessed at 10:45 a.m., in Courtroom C;

1 and reconvened at 10:55 a.m., in Judge's Chambers.)

2 THE COURT: Let's go on the record here. These were
3 the interrogatories we had revised after our last discussion.
4 And, for instance, with respect to -- I think initially there
5 had been a request after two, after the December 19, 2001
6 rapes, well -- two, that after the December 19, 2001 rapes,
7 that severe, pervasive and offensive be taken out, is that
8 right?

9 MR. OLDS: Actually one, two, three and four. I
10 don't know why that has to appear in the question. You tell
11 them in your instructions that the school district is not
12 responsible for the December 19th rape. I think these
13 questions are just going to confuse the jury.

14 THE COURT: That doesn't tell me anything. I need
15 to know why they're confusing?

16 MR. OLDS: The questions are, they are set up to
17 track precisely the elements of a completed cause of action.

18 (Discussion held off the record.)

19 THE COURT: This truly is not indecision on my part,
20 I can see this glass not darkly but clearly. I just want to
21 get it right, that's all. The closing arguments have already
22 been made. Mr. Marnen, I take it that by virtue of your

23 initial acquiescence that the December 19, 2001 -- this point

24 is academic -- again, by the way, because I'm convinced they're

25 going to find it. I want to make sure that we're right. I

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1 find myself in the unusual position of trying to protect the

2 record from plain err. I can't understand how you're right.

3 MR. MARNEN: Maybe not I'm not. The way I was

4 seeing it was if the rape occurred within the "jurisdiction" of

5 the school district, and the administrators at Strong Vincent

6 were indifferent to it, did nothing about it, and caused more

7 severe harassment to occur, they're not responsible for the

8 rape, but it makes them responsible for the subsequent

9 harassment.

10 MR. OLDS: Let's look at it like this.

11 THE COURT: Here's an easy way to clear this up,

12 maybe it's not too late in the day to do this. The district

13 hotly disputes its deliberate indifference, for all the reasons

14 that we've spent --

15 MR. MARNEN: Yes.

16 THE COURT: The district disputes the fact that

17 these girls were subjected to intentional harassment?

18 MR. MARNEN: No. No, I didn't stand up there and
19 concede that.

20 THE COURT: Does the district dispute the fact that
21 both of these girls were subjected to harassment that was
22 severe or pervasive?

23 MR. MARNEN: No.

24 THE COURT: Well, then, guess what, we just solved
25 the problem. We've just solved the problem. The jury is not

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1 because, frankly, the way the evidence has come in, I can't see
2 how any reasonable juror could have concluded otherwise. So
3 you know what we've done.

4 MR. MARNEN: We'll start with three.

5 THE COURT: We're going to start with three. I
6 should have thought about this two hours ago. That's it, that
7 solves it. All right.

8 MR. OLDS: Judge, will you let us look at the charge
9 before you give it, one more time?

10 THE COURT: I will, out of an abundance of caution.

11 (Discussion held off the record.)

12 (Proceedings recessed in Judge's Chambers; and

13 reconvened at 11:28 a.m., in Courtroom C.)

14 THE COURT: My clerk is giving you, first of all,

15 the two pages of the charge that were changed consistent with

16 the discussion in chambers, I want you to quickly look at it.

17 It's the question of intentional harassment, as to severe and

18 pervasive, I think it's consistent with our previous

19 discussion.

20 MR. OLDS: Your Honor, did you take out -- let me

21 just check.

22 THE COURT: The only difference -- Mr. Olds, I

23 removed from the jury's consideration the issue of intentional

24 harassment, whether it was pervasive or severe. All right.

25 You also have in front of you interrogatories to the jury,

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1 which I believe should now be consistent with our in-chambers

2 discussion. Would you please glance at them. Is it acceptable

3 to the plaintiff?

4 MR. OLDS: Yes.

5 THE COURT: Is it acceptable to the defendant?

6 MR. MARNEN: It's acceptable.

7 (Whereupon, at 11:32 a.m., the Jury reenters

8 Courtroom C.)

9 THE COURT: I apologize for the delay. Ladies and
10 gentlemen, it is now my duty to tell you about the law that is
11 to be applied to this case in which you will be the finders of
12 fact. You have heard all the arguments and all of the evidence
13 and it my function to charge you on the law which you are
14 required to consider and which will govern your deliberations.

15 For convenience, in the course of these
16 instructions, R.P. and K.L. may be referred to as the
17 plaintiffs, which is just the legal name for the people filing
18 the lawsuit. The School District of the City of Erie and Linda
19 L. Cappabianca may be referred to as the defendants, which is
20 the legal name for the party against which a suit is filed.

21 In deciding these issues of fact, it is your duty to
22 follow these instructions. In doing so, you must take into
23 consideration all of the instructions which I give you, and not
24 pick out any particular instruction and disregard another one.
25 Your duty is to determine the facts from the evidence that has

1 been produced in open court. You are to apply the facts as you
2 find them to the law that I am giving you, and neither sympathy
3 nor prejudice should influence you in any way. Our system of
4 law does not permit jurors to be governed by sympathy,
5 prejudice or public opinion.

6 At the outset, you should understand that I am
7 absolutely neutral in presenting these instructions to you.
8 I will not give you my opinion about any issue of fact to be
9 determined by you. Nothing in the way in which I give my
10 instructions to you is intended as an expression of my opinion
11 about any fact at issue in this case.

12 I will now instruct you on the substantive
13 principles of law that govern the plaintiffs' claims in this
14 case.

15 Title IX, a law adopted by the United States
16 Congress, provides that "no person shall, on the basis of sex,
17 be excluded from participation in, be denied the benefits of,
18 or be subjected to discrimination under any education program
19 or activity receiving federal financial assistance." In
20 certain situations student-on-student sexual harassment, if

21 sufficiently severe, can amount to a violation of Title IX by a
22 school district. Now, the court has already concluded, as a
23 matter of law, that plaintiffs R.P. and K.L. were subjected to
24 harassment because of their sex by the intentional conduct of
25 other students. The court has also concluded as a matter of

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1 law that this harassment was severe or pervasive, and offensive
2 to a reasonable person of the plaintiffs' sex. Therefore, in
3 order for plaintiffs to establish their Title IX claim against
4 the defendant Erie School District, plaintiffs have the burden
5 of proving each of the following elements of their claim by a
6 preponderance of the evidence.

7 First, plaintiffs must prove by a preponderance of
8 the evidence that the defendant Erie School District had actual
9 knowledge of the sexual harassment. The Erie School District
10 is deemed to have had "actual knowledge" of the discrimination.
11 If you find that Ms. Cappabianca or Ms. Woods had knowledge of
12 facts sufficiently indicating substantial danger to the
13 plaintiffs such that the institution can reasonably be said to
14 be aware of the danger.

15 Second, plaintiffs must prove by a preponderance of
16 the evidence that the defendant Erie School District acted with
17 deliberate indifference to the known acts of harassment. A
18 school district acts with "deliberate indifference," if the
19 school district's response to the alleged harassment or lack of
20 response to the alleged harassment is clearly unreasonable in
21 light of the known circumstances. If the school district has
22 actual knowledge that its efforts to correct known harassment
23 are ineffective, but the school district persists in those
24 efforts to no avail, the district has failed to act reasonably
25 in light of the known circumstances.

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1 Third, the plaintiffs must prove by a preponderance
2 of the evidence that the alleged deliberate indifference of the
3 defendant Erie School District caused plaintiffs to suffer
4 harassment or made them more vulnerable to harassment and that
5 the deliberate indifference of the defendant Erie School
6 District caused injury.

7 In addition to the Title IX claim asserted by both
8 plaintiffs against the Erie School District, plaintiff R.P. has

9 asserted a claim of defamation against defendant Linda
10 Cappabianca. A defendant who publishes a statement such as
11 that allegedly attributed to defendant Cappabianca in this case
12 is liable for the proven actual harm that the statement causes.

13 To prevail upon her defamation claim, plaintiff R.P.
14 must first establish by a preponderance of the evidence that
15 the alleged statement was actually made. Then if you find that
16 defendant Cappabianca made the alleged communication to
17 Robin J. and T.N., you must determine whether the statement
18 caused actual injury to plaintiff R.P. A false and defamatory
19 communication is a cause of actual injury if it is a
20 substantial factor in bringing the injury about. A false and
21 defamatory communication is not a cause of actual injury if it
22 has no connection or only an insignificant connection with the
23 injury. Actual injury can include impairment of reputation and
24 standing in the community, personal humiliation and mental
25 anguish and suffering.

1 If you conclude by a preponderance of the evidence
2 that a statement was made and that it caused actual injury, you

3 may award general damages such as is reasonable. In addition,
4 if you find in favor of plaintiff R.P. and against defendant
5 Cappabianca, you must also determine for purposes of damages,
6 of which I will later speak, whether defendant Cappabianca
7 acted intentionally or recklessly.

8 A person intentionally makes a defamatory
9 communication when she knows that it is false.

10 A person recklessly makes a defamatory communication
11 when she does so with disregard for whether it is true or
12 false, i.e., when she does so despite serious doubts about the
13 truth of the communication or when she possess a high degree of
14 awareness of its probable falsity but makes it anyway. Serious
15 doubt and/or the possession of a high degree of awareness of
16 probable falsity may be inferred from relevant circumstantial
17 evidence of a statement if its of the mind of a person who
18 transmitted the defamation. Testimony by that person denying
19 serious doubt and/or a high awareness of its probable falsity
20 does not automatically defeat proof of recklessness but rather
21 is to be weighed with all the other evidence of that present
22 state of mind.

23 I'll now give you a few guidelines on how to

24 deliberate upon the evidence which you have heard. As I told

25 you at the beginning of the case, the evidence with which you

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1 are to -- let me say that again. The evidence which you are to

2 consider consists of the testimony of the witnesses and the

3 exhibits offered and received into evidence. The proceedings

4 during the trial have been governed by the rules of law. And

5 we've had a number of conferences to determine what evidence

6 should be allowed to be submitted to you.

7 From time to time it has been my duty to rule on

8 evidence to be submitted and you should not concern yourselves

9 with the reasons for those rulings. You are not to consider

10 any testimony or any exhibit to which I have sustained an

11 objection, or any exhibit which may have been ordered stricken

12 from the record or which has not been introduced into evidence.

13 Now, the attorneys have argued very ably and

14 thoroughly and have been very well prepared. But their

15 remarks, that is what they have said to you is not evidence.

16 They have argued to help you understand the facts and their

17 respective theories of the case, but their arguments again are

18 not evidence. You must consider as evidence only the testimony
19 and exhibits. If you should find that any argument, statement
20 or remark of counsel has no basis in the evidence, then you
21 should disregard that argument, statement or remark.
22 Similarly, if you find that anything I tell you about the facts
23 is not based on the evidence, you should disregard that, too,
24 because you are the finders of the fact. It is up to me only
25 to tell you what the law is.

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1 The next matter which I will now instruct you is the
2 applicable burden of proof. The burden of proof is a concept
3 which you must understand in order to give the case proper
4 consideration because a verdict cannot be based on speculation,
5 guess or conjecture.

6 In civil cases such as this one, the plaintiff has
7 the burden of proving those contentions that entitle them to
8 relief by a preponderance of the evidence. Thus, the
9 plaintiffs carry the burden of proving by a preponderance of
10 the evidence each of the elements that I have previously set
11 forth for you.

12 The fair weight or preponderance of the evidence
13 means evidence which has been more convincing force, when it is
14 weighed against the evidence opposed to it, so that the greater
15 probability of truth lies therein. If you were to visualize
16 evidence as something weighed on an ordinary balance scale and
17 if the evidence admitted in support of the claim made by the
18 party having the burden of proof is more weighty in probative
19 value than the evidence offered in opposition so that it tips
20 the scales on the side of that party, then the party has proven
21 the claim by the fair weight or preponderance of the evidence.

22 If, on the other hand, the evidence admitted in
23 opposition to the claim of the party having the burden of proof
24 outweighs or equally balances the evidence produced in support
25 of the claim, it can be said there has been a failure to carry

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1 the burden of proof imposed by law.

2 It's important to note that we speak here of the
3 quality of evidence, not necessarily its quantity. Also, all
4 the evidence admitted in support of and in opposition to the
5 claim must be considered and not just the evidence offered by

6 the party having the burden of proof. In short, the test is
7 not which side brings the greater number of witnesses or
8 presents the greater quantity of evidence, but which witness or
9 witnesses and which evidence you consider most worthy of
10 belief. Even the testimony of one witness may outweigh that of
11 many if you have reason to believe his or her testimony in
12 preference to their testimony.

13 In deciding the facts of this case, members of the
14 jury, you should consider all the evidence presented by the
15 parties. Consideration of all the evidence, however, does not
16 mean that you must accept all the evidence as true or accurate.
17 In this connection, rather, the evidence in the case consists
18 of the sworn testimony of the witnesses, regardless of who may
19 have called them, all exhibits received into evidence,
20 regardless of who may have produced them, and all facts which
21 were admitted to or stipulated to by the parties.

22 While you may consider only the evidence in the case
23 in arriving at your findings of fact, you are permitted to draw
24 such reasonable inferences from the testimony and exhibits of
25 counsel as you feel are justified in light of common

1 experience. Now, an inference is not a suspicion or a guess.
2 A suspicion is a belief based on circumstances which do not
3 amount to proof. A guess is speculation or conjecture. An
4 inference, on the other hand, is a reasoned logical decision to
5 conclude that a disputed fact exists on the basis of another
6 fact that you know exists. In other words, you may reach
7 conclusions which reason and common sense lead you to reach
8 from the facts which have been established by a preponderance
9 of the evidence. There are times when different inferences may
10 be drawn from the facts, whether proved by direct or
11 circumstantial evidence. Plaintiffs will ask you to draw one
12 set of inferences, while the defendants will ask you to draw
13 another. It is for you and for you alone to determine what
14 inferences you will draw.

15 If you find that the defendants have destroyed
16 documents or withheld evidence which they ought to have
17 produced for this litigation, then in certain instances you may
18 draw an inference that if produced, that evidence would have
19 been unfavorable to that defendant. For this inference to
20 apply, the evidence in question must have been within the
21 defendant's control and it must appear that there has been

22 actual suppression or withholding of the evidence. No
23 unfavorable inference arises when the circumstances indicate
24 that the document or article in question has been lost or
25 accidentally destroyed. Or where the failure to produce it is

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1 otherwise properly accounted for.

2 Now, in deciding this case, members of the jury, you
3 are required to pass on the credibility of witnesses.
4 Credibility simply means believability. Your function is to
5 decide what is believable, who is believable, and how much
6 weight to give it. In doing this, you must use your common
7 sense, your varied backgrounds and experience. The usual
8 indicators of truth that you all use in your daily lives.

9 A witness's testimony depends on the witness's
10 observation and perception of what he or she testifies to.
11 It also depends on the witness's memory and what he or she
12 experienced at the time and the witness's ability to create
13 that experience in court.

14 You may consider the degree of the witness's
15 intelligence, the demeanor and appearance of the witness, the

16 witness's frankness, his or her candor, the evasiveness or
17 responsiveness, as well as the reasonableness or
18 unreasonableness of the witness's testimony in light of all the
19 circumstances. You may also consider any interest or bias that
20 might lead a witness to exaggerate, understate or otherwise
21 color his or her testimony, such as a witness's interest in the
22 outcome of the case or bias or prejudice that a witness might
23 have in favor of or against a party. This is not to suggest
24 that an interest or bias of a witness would lead the witness to
25 tell you a falsehood, or color his or her testimony one way or

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1 the other. But bear these factors in mind in passing upon the
2 credibility or believability of every witness.

3 I charge you that if you find that a witness has
4 lied to you in any material portion of his or her testimony,
5 you may disregard that witness's testimony in its entirety.
6 I say that you may disregard the testimony, not that you must.
7 If you choose to disregard the testimony of any witness because
8 you believe that the witness has been untruthful with you, it
9 must have been untruthfulness in a material portion of that

10 witness's testimony. You must be careful, though, that the
11 untrue part of the testimony was not the result of a mistake or
12 inadvertence, but was rather willful, and stated with a design
13 of intent to deceive.

14 Regardless of whether a witness's testimony is
15 untruthful by design or inadvertence, however, you may reject
16 all or any portion of the testimony, as in the case of any
17 witness if the testimony is not believable by you. On the
18 other hand, you may be convinced that despite the falsity of a
19 part of the witness's testimony, he or she in other parts
20 testified truthfully.

21 You may find inconsistencies in the evidence, even
22 actual contradictions in the testimony of witness's. Although,
23 it does not necessarily mean that any witness has been
24 willfully false. Poor memory is not uncommon. Sometimes a
25 witness forgets, sometimes he or she remembers incorrectly.

1 It's also true that two persons witnessing the same incident
2 may see it or may hear it differently. If different parts of
3 the testimony of any witness or witnesses appear to you to be

4 inconsistent, you should try to reconcile the conflicting
5 statements whether of the same or of different witnesses. And
6 you should do so if it can be done fairly and satisfactorily.
7 If, however, you find that there is a genuine and
8 irreconcilable conflict in the testimony, it is your duty and
9 your function to determine which if any of the contradictory
10 statements you will believe.

11 Now, as you will recall, that Dr. Schachner gave
12 testimony in this case as an expert. A witness who has special
13 knowledge, skill, experience or training in a particular
14 science, profession or occupation, may give his or her opinion
15 as an expert on any matter in which that witness's skill,
16 experience or training in the particular science, profession or
17 occupation has been shown. In determining the weight to be
18 given to an expert's opinion, you should consider his or her
19 qualifications and reliability and the reasons given for the
20 opinion. You are not bound by an expert's opinion merely
21 because he or she is an expert. You may accept it or reject it
22 as in the case of any other witness. Give it the weight, if
23 any, you think it is entitled to.

24 In general, the opinion of an expert only has value

25 when you accept the facts on which it is based. This is true

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1 whether the facts are assumed hypothetically by the expert,
2 come from his or her personal knowledge, or come from some
3 other proper source, or any combination of sources.

4 I will now instruct you on the law as it relates to
5 damages. The fact that I am instructing you on the proper
6 measure of damages should not be considered as intimating any
7 view of mine as to which party is entitled to your verdict in
8 the case. Instructions as to the measure of damages are given
9 for your guidance in the event you should find in favor of the
10 plaintiffs from a preponderance of the evidence in this case in
11 accordance with the other instructions. Plaintiffs are not
12 required to prove their damages by mathematical certainty. But
13 they do have the burden of proving their entitlement to damages
14 by a preponderance of the evidence.

15 You may award damages on plaintiffs' Title IX claim
16 only if you find in favor of the plaintiffs as to the claim.
17 You will not consider damages unless you find that the Erie
18 School District is liable to the plaintiffs. If you find for

19 plaintiffs under their sexual harassment claim, you may award
20 them compensatory damages. Compensatory damages include
21 compensation for any emotional pain, suffering, inconvenience,
22 mental anguish and loss of the enjoyment of life that the
23 plaintiffs suffered as a result of the deliberate indifference
24 of the defendant Erie School District to the harassment
25 suffered by the plaintiffs. Of course, for items such as these

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1 there is not and cannot be a fixed measurement. It is measured
2 by the character, nature and extent of the injuries as shown
3 by the evidence. It is not compensation from a sentimental or
4 benevolent standpoint. But an amount that would be the most
5 reasonable amount of compensation under the circumstances shown
6 by the evidence. You should consider all the facts and
7 circumstances in evidence and give to each plaintiff the amount
8 that you believe will equitably, fairly and justly compensate
9 them for these damages.

10 As I previously stated, the court has determined
11 that the Erie School District could not have had actual
12 knowledge of the events leading up to the December 19, 2001

13 rape that occurred in the laundromat. Therefore, you may not
14 award damages for injuries that flows solely from or were
15 caused solely by that rape. Rather, you may only award damages
16 for injuries that you find that the plaintiffs suffered
17 stemming from conduct which occurred after the rape. However,
18 in determining the amount of damages, if any, which you may
19 find the plaintiffs are entitled to as a result of the
20 harassment experienced after December 19, 2001, you may
21 consider whether any such damages were acerbated by virtue of
22 the plaintiffs' psychological condition as a result of the
23 December 19, 2001 rapes.

24 Similarly, you may find -- let me say that again.

25 Similarly, you may award damages to plaintiff R.P. on her

1 defamation claim only if you find in her favor on that claim.
2 If you find that R.P. was defamed, then she is entitled to be
3 fairly and adequately compensated for all the harm she suffered
4 as a result of the false and defamatory communication published
5 by defendant Cappabianca. The injuries for which you may
6 compensate the plaintiff by an award of damages include the

7 actual harm to R.P.'s reputation, which you find resulted in
8 the defendant Cappabianca's conduct. The emotional distress,
9 mental anguish and humiliation which you find that R.P.
10 suffered as a result of defendant Cappabianca's conduct. And
11 any other special injuries which you find that R.P. suffered as
12 a result of the defendant Cappabianca's conduct.

13 In determining the amount the amount of award or
14 such presumed injury to R.P.'s reputation, you may consider her
15 character and previous general standing and reputation in her
16 community. You may also consider the character of the
17 defamatory communication which defendant Cappabianca allegedly
18 made. It's area of dissemination and the extent and duration
19 of the publication.

20 Finally, in addition to the damages mentioned above,
21 the law permits a jury under certain circumstances to award the
22 injured person punitive damages in order to punish the
23 defendant for some extraordinary misconduct and to serve as an
24 example or warning to others not to engage in such conduct.

25 Here, if you find that the defendant Cappabianca

1 demonstrated actual malice in making the defamatory statement
2 about R.P., you may award punitive damages against defendant
3 Cappabianca. In order to prove actual malice, R.P. must
4 demonstrate that defendant Cappabianca published a defamatory
5 communication with the knowledge that it was false or in
6 reckless disregard of whether it was true or false.
7 If you find that the defendant Cappabianca acted with actual
8 malice in publishing the defamatory communication, it is your
9 job to fix the amount of punitive damages to be awarded to R.P.
10 and against defendant Cappabianca. In doing so, you may
11 consider any or all of the following factors. The character of
12 the defendant's act. The nature and the extent of the harm to
13 plaintiff caused by the defendant. And the wealth of the
14 defendant insofar as it is relevant in fixing an amount that
15 will punish her and deter her and other individuals from
16 similar conduct in the future.

17 The amount of punitive damages award, if any, must
18 not be the result of passion or prejudice against the
19 defendant. The sole purpose of punitive damages is to punish
20 the defendant's allegedly outrageous conduct and to deter the
21 defendant and others from similar acts.

22 Now, I'm going to backtrack a little bit, this

23 generally appears in my general charge, but for some reason it
24 was inadvertently omitted. But I want to talk to you a little
25 bit about direct and circumstantial evidence.

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1 There are two types of evidence which you may
2 properly consider in deciding the issues of fact. One type of
3 evidence is called direct evidence. Direct evidence is where a
4 witness testifies to what he or she saw, heard or observed. In
5 other words, when a witness testifies about what is known to
6 him or her of his or her own knowledge, by virtue of a
7 witness's senses, what he or she sees, feels, touches or hears,
8 that's called direct evidence.

9 The other type of evidence is called circumstantial
10 evidence. Circumstantial evidence is evidence which tends to
11 prove that a disputed fact by proof of other facts. I will
12 give an example of what the term circumstantial evidence means.
13 Assume that when you came into the courthouse this morning the
14 sun was shining, it was a nice day. Of course, that happily
15 was true. Assume that the courtroom blinds here were drawn so
16 you could not look outside. And as you were sitting here,

17 someone walked in the back with an umbrella that was dripping
18 wet. Somebody else then walked in with a raincoat that was
19 dripping wet. You cannot look outside of the courtroom to see
20 whether it was raining, so you have no direct evidence of that
21 fact. But based on the combination of facts that I've asked
22 you to assume, it would be reasonable and it would be logical
23 for you to conclude that it had been raining.

24 That is all there is to circumstantial evidence.

25 You infer on the basis of reason, experience and common sense

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1 from an established fact the existence or the nonexistence of
2 some other fact.

3 Circumstantial evidence is of no less value than
4 direct evidence. As a general rule, the law makes no
5 distinction between direct and circumstantial evidence. The
6 law simply requires that before making a finding of fact, the
7 jury must be satisfied that the fact has been proved by a
8 preponderance of the evidence in the case.

9 Now, as I mentioned to you at the outset, I am
10 entirely neutral about the outcome of this case. I do not want

11 you to think that anything I have said, any instruction I have
12 given you or any ruling I may have made on the evidence, or any
13 statement I made either to counsel or to you implies that I
14 have any position in this case at all, other than to give you
15 fairly the law that you are required to apply and to rule
16 fairly and impartially on the evidence that has been submitted
17 to you. I have absolutely no interest in how this case
18 resolves itself, only in the procedure by which it is done.

19 As I told you before, it is for you, and you alone,
20 to determine the facts of the case and the credibility of each
21 witness. If your recollection of the testimony varies with any
22 statements that are inadvertently made by me or counsel for any
23 party in reviewing the testimony, you have to be guided by your
24 own memory and your recollection of the testimony. You
25 determine the facts from all of the testimony that you have

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1 heard, and the other evidence which has been received during
2 the trial. Neither I nor anyone else may infringe on your
3 responsibility as the sole judges of the facts. On the other
4 hand, and of equal importance, you must accept the rules of law

5 as I have given them to you and apply those rules to the facts
6 of this case.

7 I'm now going to instruct you on your deliberations,
8 that is what you are to do when you retire to the jury room.
9 First, the attitude and conduct of the jury at the outset of
10 the deliberations are matters of considerable importance. When
11 you retire to the jury room for your deliberations, they should
12 proceed in an orderly fashion. The first order of business in
13 the jury room will be to select one of you to act as the
14 foreperson. You are free to select any one of you to act in
15 that capacity. The foreperson will preside over your
16 deliberations and will speak for you here in court should that
17 become necessary. One more thing about the foreperson. The
18 fact that somebody is a foreperson does not mean that he or
19 she, that his or her vote is entitled to any greater weight
20 than the vote of any other juror.

21 In the course of your deliberations, if you should
22 find yourself in doubt concerning any part of my instructions
23 to you about the law, if you need clarification, you may
24 request further instructions. In that event, you should
25 transmit a note, signed by the foreperson to me through my

1 courtroom deputy. Nobody should try to communicate with the
2 court by means other than a signed writing. I will not
3 communicate with any juror on any subject relating to the
4 merits of the case except in writing or orally here in court
5 with all counsel present.

6 You should not at any time reveal, even to me, how
7 you stand numerically until you have reached a verdict. Your
8 responsibility to reach a fair conclusion from the evidence and
9 the applicable law is an important one. Your verdict should be
10 reached only after careful and thorough deliberations during
11 which you should consult with each other and discuss the
12 evidence and the reasonable inferences to be drawn from the
13 evidence freely and fairly in a sincere effort to arrive at a
14 just verdict.

15 It is your duty to consider the evidence with a view
16 towards reaching agreement on a verdict if you can do so
17 without violating your individual judgment and conscience. You
18 must decide this case for yourself, examining the issues in
19 evidence with candor and frankness, and with proper deference

20 to and with regard to the opinions of each other. Mature
21 consideration requires that you be willing to re-examine your
22 own views and to change your opinions if you are convinced that
23 your opinions lack merit or validity. On the other hand, while
24 you may maintain this flexibility, no juror is required to
25 surrender his or her honest conviction as to the weight or

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1 effect of the evidence because another juror's opinion differs
2 from his or hers, or for the mere purpose of returning a
3 verdict.

4 The verdict must represent the considered judgment
5 of each juror. In order to return a verdict, it is necessary
6 that each juror agree thereto. Your verdict therefore must be
7 unanimous.

8 Keep in mind that the dispute between the parties in
9 this case is for them a most serious matter. They and the
10 court rely on you to give full and conscientious deliberation
11 and consideration to the issues and evidence before you. You
12 should not allow sympathy or prejudice to influence your
13 deliberations. You should not be influenced by anything other

14 than the law and the evidence in this case. All of the parties

15 here stand equal before the court and each is entitled to the

16 same fair and impartial treatment at your hands.

17 Let me see counsel at side bar.

18 (On the record at side bar.)

19 THE COURT: I would propose that, as long as there

20 is no objection, is to send copies of the charge out with the

21 jury. And I would propose to insert in there the

22 circumstantial and direct evidence portion that was

23 unintentionally omitted. That having been said, are there any

24 other objections to the charge as given?

25 MR. OLDS: No.

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1 MR. MARNEN: No.

2 THE COURT: No objections, all right.

3 (End of discussion at side bar.)

4 THE COURT: Now, members of the jury, when you go

5 out to deliberate, in addition to receiving all of the exhibits

6 that have been admitted into evidence -- well, I should also

7 tell you that I'm going to send out with you a couple copies of

8 my written charge because I knew that would be the first thing

9 you asked for. So I'm beating you to the punch.

10 I will also send out with you a document styled

11 Interrogatories to the Jury. And this is essentially another

12 word for a verdict form. And it is self-explanatory. I just

13 want to make a quick point about it. After it has been

14 completed, it is important, you will notice that there is a

15 line on the last page for the foreperson and all of the jurors.

16 Each juror, in addition to the foreperson, must sign the jury

17 form. Although, a date line does not appear, please put a date

18 there as well. And then where are all the exhibits, by the

19 way?

20 THE CLERK: I have them all here.

21 THE COURT: All right. Counsel, you have reviewed

22 all of those with my Deputy Clerk and everybody is satisfied

23 with what's going out, is that right?

24 MR. OLDS: Yes.

25 MR. MARNEN: We agreed that one would not.

1 THE COURT: Is that the matter we talked about

2 outside the presence of the jury?

3 MR. MARNEN: Yes, sir.

4 THE COURT: But aside from that, we're good to go on
5 the exhibits?

6 MR. OLDS: Yes.

7 THE COURT: All right, Nicole, raise your right
8 hand.

9 (Whereupon, the Deputy Clerk was sworn.)

10 THE COURT: All right, we're in recess during jury
11 deliberations.

12 (Whereupon, at 12:10 p.m.; the Jury goes to the jury
13 room to begin their deliberations.)

14 (Proceedings reconvened at 12:30 p.m., in Judge's
15 Chambers.)

16 THE COURT: The question from the jury is "Can we
17 see the time line of events that Mr. Olds displayed in the
18 courtroom? We would like the poster board itself. Foreperson
19 Kristina S. Cogan." Is that the board you were writing on?

20 MS. RUSS: He didn't actually write on it. He
21 displayed it.

22 MR. OLDS: It was displayed, the big poster board.
23 I think there was testimony about all the events on there.

24 THE COURT: I presume, for the record, I'm talking
25 to you, Mr. Olds, it's your preference that the jury be

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1 permitted to have it as a visual aid?

2 MR. OLDS: Right.

3 MR. MARNEN: I don't have any problem with it.

4 THE COURT: I'm going to send it out to them with
5 this caveat. It's being provided as an individual visual aid,
6 but at the end of the day it's their recollection that
7 controls.

8 MR. MARNEN: I guess, if you don't mind, that it's
9 plaintiffs' version of things.

10 THE COURT: I'll say this document was prepared by
11 plaintiffs' counsel. After consultation with the lawyers,
12 we're going to permit you to have it in the jury room. But
13 remember that it's your recollection ultimately that controls
14 as to the time line.

15 THE COURT: Bring the jury into the box.

16 (Proceedings recessed at 1:34 p.m., in Judge's
17 Chambers; and reconvened at 1:35 p.m., in Courtroom C.)

18 THE COURT: I received the following question from
19 you, members of the jury. "Can we see the time line of events
20 that Mr. Olds displayed in the courtroom? We would like the
21 poster board itself." Signed the foreperson, Kristina S.
22 Cogan. I presume it's the poster board right in front?

23 THE FOREPERSON: Yes, sir.

24 THE COURT: The answer to that question is yes, you
25 may have it, after consultation with both counsel, no one has

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1 an objection. Let me remind you that the poster board itself,
2 of course, was prepared by Mr. Olds. With respect to the time
3 line as an issue of fact, it's your recollection that controls.
4 But it can go out with you as a visual aid.

5 (Whereupon, at 1:37 p.m., the Jury reconvened its
6 deliberations.)

7 (Whereupon, at 3:00 p.m., the Jury returns to
8 Courtroom C with their verdict.)

9 THE COURT: Members of the jury, I'm informed you've
10 reached a verdict, is that correct?

11 THE FOREPERSON: Yes.

12 THE COURT: Would you please retrieve the verdict
13 form from the foreperson. The verdict form is in order, you
14 can publish it.

15 THE CLERK: Interrogatories to the Jury. In the
16 United States District Court, For the Western District of
17 Pennsylvania. Richard P., et al., v. School District of the
18 City of Erie, et al. Civil Action No. 03-390 Erie.

19 Do you find that defendant Erie School District had
20 actual knowledge of the harassment of plaintiff R.P. by other
21 students after the December 19, 2001 rapes?

22 Answer: No.

23 Do you find that defendant Erie School District had
24 actual knowledge of the harassment of plaintiff K.L. by other
25 students after the December 19, 2001 rapes?

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1 Answer: No.

2 Do you find that defendant Linda Cappabianca made a
3 defamatory communication to Robin J. and T.N. that related to
4 plaintiff R.P.?

5 Answer: No.

6 Signed by all eight members of the jury and dated
7 January 30, 2006.

8 THE COURT: Mr. Olds, do you want the jury to be
9 polled?

10 MR. OLDS: Yes, your Honor.

11 THE COURT: Poll the jury, please. I'll do it.

12 We're going to start with you, juror number one. Is the
13 verdict as read your verdict?

14 JUROR NO. 1: Yes, it is.

15 THE COURT: Juror number two, is the verdict as read
16 your verdict?

17 JUROR NO. 2: Yes, it is.

18 THE COURT: Juror number three, is the verdict as
19 read your verdict?

20 JUROR NO. 3: Yes, it is.

21 THE COURT: Juror number four, is the verdict as
22 read your verdict?

23 JUROR NO. 4: Yes, it is.

24 THE COURT: Juror number five, is the verdict as
25 read your verdict?

1 JUROR NO. 5: Yes.

2 THE COURT: Juror number six, is the verdict as read
3 your verdict?

4 JUROR NO. 6: Yes, it is.

5 THE COURT: Junior number seven, is the verdict as
6 read your verdict?

7 JUROR NO. 7: Yes.

8 THE COURT: Juror number eight, is the verdict as
9 read your verdict?

10 JUROR NO. 8: Yes, your Honor.

11 THE COURT: Members of the jury, let me take this
12 opportunity to thank you for your attention throughout the
13 course of this trial, and for your punctuality in getting here.
14 I know some people had to come from a little farther distance
15 than others, it is greatly appreciated. There are a lot of
16 people that you've probably seen working here in the
17 courthouse. When you come in the front door, you see some
18 court security personnel, there's some federal Marshals here.
19 There's court personnel, there's law clerks. There's court
20 reporters, and a few judges, too. The fact of the matter is

21 nobody is more important than the juries that come in and out

22 of here. Because without juries, to the state the obvious, we

23 would not be able to proceed with our jury trials. And the

24 whole system would come to a grinding halt. Your service as

25 jurors then during this term is now complete. I'm going to be

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1 off the bench presently, so if you would wait just briefly in

2 the jury room, I will chat with you for a few minutes before

3 you get on your way. But you leave with my thanks. The

4 verdict having been returned, these proceedings are now over.

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6 (Whereupon, at 3:05 p.m., the Jury Trial proceedings

7 were concluded.)

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1 C E R T I F I C A T E

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5 I, Ronald J. Bench, certify that the foregoing is a

6 correct transcript from the record of proceedings in the

7 above-entitled matter.

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11 _____

12 Ronald J. Bench

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